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Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois

By Timothy P. O'Neill*

INTRODUCTION

Six months after the Confederate surrender at Appomattox, a South Carolina plantation owner named Edmund Rhett was named to a state commission to draft new laws reflecting the end of slavery. In a letter written in October 1865, he laid out his goal: the Negro “should be kept as near to the condition of slavery as possible, and as far from the condition of the white man as is practicable.”¹ To this end, he recommended that the legislature pass a stringent law against Negro vagrancy. Rhett noted that the “object of this Law would be to give fixedness to [the black] population and to prevent their eternal wanderings and floating about the state from one point to another, lazy, lawless, thieving and vagrandizing.”²

South Carolina was not alone. Within a year after the end of the Civil War, almost every former Confederate state passed sweeping vagrancy laws allowing for the arrest of any man who did not have a labor contract.³ Enforcement of these laws disproportionately targeted freed slaves and was designed to keep them from leaving their former masters’ plantations.⁴ Southern cities also passed vagrancy ordinances that punished violators by sending them to workhouses or street crews.⁵

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1. STEPHEN BUDIANSKY, *THE BLOODY SHIRT: TERROR AFTER APPOMATTOX* 24 (2008).

2. *Id.* at 25.

3. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 383 (2004) (stating that the only exceptions at that time were Tennessee and Arkansas).

4. *Id.* at 383–84.

5. *Id.* at 383. For instance, the mayor of Mobile, Alabama warned vagrants that “if they did not find employment or leave the city they would be arrested and forced to work on public streets.” *Id.*

These state and local laws as applied essentially criminalized unemployment among former slaves.

Vagrancy laws were nothing new. The breakup of feudal estates in fourteenth-century England spawned several legal measures aimed at alleviating the resulting shortage of farm workers. The purpose of such laws was to restrict the movement of workers away from their former estates.⁶ When curtailing the geographical mobility of laborers was no longer necessary, however, the laws did not disappear. Rather, they evolved into devices to control the English poor⁷ by criminalizing not only a “refusal to labor” but “begging” as well.⁸

The English vagrancy laws paralleled those in effect in the antebellum South.⁹ Versions of these laws remained on the books for more than a century, until the United States Supreme Court confronted them head-on in cases such as *Papachristou v. City of Jacksonville*.¹⁰ In *Papachristou*, a Jacksonville, Florida vagrancy ordinance made it a criminal offense for people to be, inter alia, “rogues and vagabonds.”¹¹ The Supreme Court struck down the ordinance as being “void for vagueness” under the Fourteenth Amendment’s Due Process Clause, not only because the law failed to provide the public with fair notice of what conduct violated the law, but also because it endowed the police

6. William J. Chambliss, *A Sociological Analysis of the Laws of Vagrancy*, in *SOCIAL PROBLEMS, LAW, AND SOCIETY* 87, 87–90 (2004) (noting that by the middle of the fourteenth century, the availability of an adequate supply of cheap labor diminished significantly due to the Black Death). Additionally, in order to fund the Crusades and various other wars, landowners sold the serfs their freedom and industrialized towns could offer a higher standard of living to freed serfs. *Id.* The development of anti-migratory vagrancy laws served to “curtail mobility of laborers in such a way that labor would not become a commodity for which the landowners would have to compete.” *Id.*

7. *Id.* at 90 (indicating that the substance of the vagrancy laws did not change from their first appearance in 1349 except for a tendency to increase punishments.). For instance, a 1360 law punished the offender with imprisonment for fifteen days while a 1388 law placed the violator in the stockade until such time that “he find surety to return to his service.” *Id.*

8. *Id.* at 95.

9. See, e.g., Markus Dirk Dubber, “*The Power to Govern Men and Things*”: *Patriarchal Origins of the Police Power in American Law*, 52 *BUFF. L. REV.* 1277, 1287–88 (citing ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 273–74 (1930)). In 1672, the Virginia Assembly ordered that English vagrancy laws be strictly enforced. *Id.* This included the whipping of vagrants and their incarceration in a house of correction until either employment was found for them or they were banished. *Id.*

10. 405 U.S. 156, 162–63 (1972) (holding that the ordinance at issue criminalized activities that are innocent by modern standards, including “nightwalking”).

11. *Id.* at 156 n.1. Based on the arrestees in the case, “rogues and vagabonds” may often have simply been black men found in the company of white women. See *id.* at 158–59 (two of the defendants in the series of consolidated cases were white females who were charged with “prowling by auto” on an early Sunday morning when they were found driving on a main thoroughfare in Jacksonville on their way to a nightclub with two black males in the automobile).

with authority to make arbitrary arrests.¹² This decision supposedly ended the arbitrary police use of vagrancy laws in America to harass poor, disenfranchised citizens.

Yet there is a question of whether things really have changed for minorities, particularly with regard to the enforcement of motor vehicle laws. On the national level, a large body of legal literature exists on the “driving while black” phenomenon.¹³ Locally, Chicagoans recently faced front-page headlines trumpeting a new study illustrating disturbing racial disparities in traffic enforcement throughout Illinois.¹⁴

One aspect of this study dealt with the number of traffic stops that resulted in the driver’s consent to a search of the vehicle. The results are stunning. In 2007, police agencies throughout Illinois utilized consent searches against Hispanic drivers more than *twice as often* as against Caucasian drivers, and consent searches against black drivers were utilized *three times as often* as against Caucasian drivers.¹⁵ Yet, and equally troubling, the searches of Caucasians were *twice as likely* to discover contraband as were the searches of minorities.¹⁶

In Illinois, minority drivers could truly be called “vagrants in Volvos.” Officially, the vagrancy laws that were once used by law enforcement to restrict the travel of minorities have been abolished.

12. *Id.* at 165–71.

13. See e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 544–46 (1997) (arguing that following the United States Supreme Court decision in *Whren v. United States*, African-Americans should expect a greater number of “driving while black” pretextual stops); Katheryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 721 (1999) (following the Supreme Court’s decision in *Whren v. United States*, “evidence that Blackness has become an acceptable ‘risk factor’ for criminal behavior” has become increasingly more mainstream in determining the correlation between race and interactions with law enforcement); Jennifer Larrabee, “DWB” and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & POL’Y 291, 294–95 (stating that while the Supreme Court analyzed pretextual race-based traffic stops under the Fourth Amendment in *Whren v. United States*, it should have addressed the constitutionality of the practice under the Equal Protection Clause of the Fourteenth Amendment while relaxing the claimant’s burden of showing that the police intended to discriminate); Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 L. & PSYCHOL. REV. 127, 136–37 (2000) (positing that unless the holding in *Whren v. United States* is overturned or state legislation provides more protection for minority motorists, the crime of “driving while black” will continue to exist and minority citizens will not “have the right to be free from unreasonable searches and seizures”).

14. Monique Garcia & Ray Long, *Study Sees Racial Bias in Traffic-Stop Searches*, CHI. TRIB., July 25, 2008, at 1.

15. *Id.*

16. See *id.* The study was conducted by the Northwestern University Center for Public Safety, relying on information gathered by the Illinois Department of Transportation from police officers’ own reports. *Id.*

However, strict enforcement of the traffic code against minority drivers and passengers simply amounts to a different means being used to achieve the same end.

Clearly, Illinois has a problem. Yet ironically, over the past decade Illinois courts have actually moved *backwards* in dealing with the issue of racial bias in traffic stops. This is because the Illinois Supreme Court has overruled a quintet of cases it decided in 2002 and 2003 that restricted the power of Illinois police during traffic stops.¹⁷ Moreover, through the Illinois Supreme Court's adoption of the "limited lockstep"¹⁸ principle in the area of search and seizure law, it has promised it will almost never require more from police than the bare minimum national standard mandated by the United States Supreme Court.¹⁹

This Article makes several contentions. First, because the Illinois Supreme Court has refused to address the serious problems Illinois faces in the area of race and traffic stops, seeking judicial relief is futile. Consequently, this Article contends that the only solution lies with Illinois' legislative and executive branches. Interestingly, some possible reforms emanate from the very doctrines the Illinois Supreme Court so unwisely recently discarded.

This Article is divided into four parts. Part I traces the last six years of Illinois Supreme Court cases in the area of race and traffic stops. It looks at five cases decided in 2002 and 2003 that established sophisticated, nuanced solutions to the problems of police using minor traffic stops as a pretext to search minorities for drugs and weapons. It then critiques the court's needless overruling of these doctrines during the last few years. Part II describes a hypothetical police officer in Illinois. Using the current state of the law, it illustrates the enormous power police officers now have to turn traffic stops for trivial offenses into opportunities for extensive—and suspicionless—searches of persons and vehicles. Part III analyzes a real case decided by the Illinois Appellate Court in 2007: *People v. Andres Roa*.²⁰ This case involved what appeared to be an ordinary stop for speeding that eventually resulted in a consent search recovering contraband.²¹ Part III examines the lessons that the *Roa* case, particularly the dissent, offers

17. See *infra* notes 124–41 and accompanying text.

18. The limited lockstep doctrine applies when a provision in the Illinois Constitution is identical or "synonymous" with a provision in the Federal Constitution and should thus be interpreted in the same manner. *People v. Caballes*, 851 N.E.2d 26, 31–32 (Ill. 2006).

19. See *infra* notes 143–47 and accompanying text.

20. 879 N.E.2d 366 (Ill. App. Ct. 2007), *vacated and remanded*, 896 N.E.2d 790 (Ill. 2008).

21. *Id.* at 367–69.

for reforming traffic stops in Illinois. Part IV then posits suggestions for remedies. Since the Illinois Supreme Court has abdicated all responsibility in this area, this Article focuses on solutions that can come from both the Illinois legislative and executive branches.

I. THE RISE AND FALL OF CURBING PRETEXTUAL TRAFFIC STOPS AND CONSENSUAL VEHICLE SEARCHES IN THE ILLINOIS SUPREME COURT FROM 2002 THROUGH 2008

During 2002 and 2003, the Illinois Supreme Court handed down an important set of five cases that extended significant new protections to drivers and passengers of automobiles who were stopped by the police. This Part will analyze these cases and then trace the Illinois Supreme Court's recent and unwise abandonment of the doctrines these cases created.

A. 2002–2003: *The Illinois Supreme Court Extends State Constitutional Protections to Curb Pretextual Traffic Stops and Consensual Vehicle Searches*

From 2002 through 2003, the Illinois Supreme Court decided five cases curbing the power of the police during traffic stops: *People v. Cox*, *People v. Gonzalez*, *People v. Bunch*, *People v. Caballes*, and *People v. Harris*.²² These five cases were in many ways a response to the United States Supreme Court's 1996 decision in *Whren v. United States*.²³ In *Whren*, the Court unanimously held that a police officer's subjective reasons—even if they were blatantly racist—for making a traffic stop were irrelevant under the Fourth Amendment.²⁴ The only relevant consideration under a Fourth Amendment analysis is whether a police officer objectively *could have* made such a stop.²⁵

This holding flatly contradicted existing policy in Illinois. Before *Whren*, Illinois courts examined whether an ostensibly proper traffic stop was merely a pretext for a stop based on illegal racial considerations.²⁶ However, after *Whren*, Illinois courts began to

22. *People v. Cox*, 782 N.E.2d 275 (Ill. 2002), *overruled by* *People v. Bew*, 886 N.E.2d 1002 (Ill. 2008); *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), *overruled by* *People v. Harris*, 886 N.E.2d 947 (Ill. 2008); *People v. Bunch*, 796 N.E.2d 1024 (Ill. 2003); *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005); *People v. Harris*, 802 N.E.2d 219 (Ill. 2003), *vacated*, 543 U.S. 1135 (2005).

23. 517 U.S. 806 (1996).

24. *Id.* at 813 (“Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.”).

25. *Id.* at 819.

26. *See, e.g.,* *People v. Guerrieri*, 551 N.E.2d 768, 770 (Ill. App. Ct. 1990) (“In determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable

approve traffic stops based on a variety of minor offenses.²⁷ Subjective police motive in making a stop became irrelevant. As long as the stop was based on some objective—albeit trivial—offense, even a racially improper motive was simply immaterial.

These minor offenses became the legal “foot in the door” for police officers to ask questions, use drug-sniffing dogs, or ask consent to search. Once this door was forced open, civil libertarians became concerned because the drivers who were stopped—not only in Illinois but throughout the entire country—were disproportionately members of minority groups.²⁸ Recognizing this phenomenon, some state courts sought to increase driver and passenger rights to a level exceeding the Federal Constitutional threshold.²⁹

This was the impetus for the Illinois Supreme Court to establish important protections for drivers and passengers in five traffic stop cases from 2002 to 2003: *People v. Cox*,³⁰ *People v. Gonzalez*,³¹ *People v. Bunch*,³² *People v. Caballes*,³³ and *People v. Harris*.³⁴

The facts of these cases suggest that minorities were being singled out for traffic stops for trivial offenses. The stops were based on such offenses as a lack of a rear license plate light,³⁵ driving 71 mph in a 65-

officer would have made the seizure in the absence of an illegitimate motive.” (citing *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)); *Kulumani v. Blue Cross Blue Shield Ass’n*, 224 F.3d 681, 685 (7th Cir. 2000) (defining “pretext” as a “dishonest explanation, a lie rather than an oddity or an error” (citing *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 147 (2000))).

27. See Timothy P. O’Neill, *Using ‘Terry’ To Show Traffic Stop Was Pretext*, CHI. DAILY L. BULL., Jan. 10, 2003, at 6 (following *Whren*, Illinois police became rather diligent in stopping motorists for minor infractions). See also *People v. Staley*, 778 N.E.2d 362, 363 (Ill. App. Ct. 2002) (regarding a stop for missing registration light); *People v. Rush*, 745 N.E.2d 157, 159 (Ill. App. Ct. 2001) (detailing a stop for a car’s tire momentarily touching the center line); *People v. Jackson*, 780 N.E.2d 826, 827 (Ill. App. Ct. 2002) (analyzing a stop for a car having air fresheners materially obstructing the windshield).

28. See David A. Harris, *Driving While Black: Racial Profiling On Our Nation’s Highways*, AM. CIVIL LIBERTIES UNION SPECIAL REP. (June 1999) (providing extensive statistical evidence of racial profiling by law enforcement in traffic stops throughout the United States).

29. See, e.g., *State v. Carty*, 790 A.2d 903 (N.J. 2002) (recognizing that because the New Jersey Constitution provides more protection for its citizens against unreasonable searches and seizures than the Federal Constitution, a consent to search following a routine stop for a traffic violation must be accompanied by a reasonable articulable suspicion that the search would yield evidence of a crime in order to ensure that searches are conducted in a non-discriminatory manner).

30. 782 N.E.2d 275 (Ill. 2002), *overruled by* *People v. Bew*, 886 N.E.2d 1002 (Ill. 2008).

31. 782 N.E.2d 260 (Ill. 2003), *overruled by* *People v. Harris*, 886 N.E.2d 947 (Ill. 2008).

32. 796 N.E.2d 1024 (Ill. 2003).

33. 802 N.E.2d 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005).

34. 802 N.E.2d 219 (Ill. 2003), *vacated*, 543 U.S. 1135 (2005).

35. *Cox*, 782 N.E.2d at 277.

mph zone,³⁶ and a defective brake light (which turned out not to be defective).³⁷ And, although race and ethnic background is not always clear from the cases, *Bunch* dealt with an African-American, *Gonzalez* concerned a Hispanic passenger, and *Caballes* involved a driver who, in the words of his attorney, was Filipino but looked Hispanic.³⁸

The Illinois Supreme Court's response in this quintet of cases was, in effect, to tell police:

Look, under *Whren* we will let you pull over minority drivers for trivial offenses for which you would probably never pull over white drivers. But don't even think of expanding the stop into something more extensive. You want to waste your time handing out tickets to African-Americans and Hispanics for having their front tire touch the center-line? Fine, issue the citation and move on. Just don't use the stop as a pretext for additional tactics, such as dog sniffs and requests for consent searches.³⁹

To better understand the direction the Illinois Supreme Court took in these five cases, this Part will examine each in detail.

1. Scope of police questioning during a traffic stop: *People v. Gonzalez*, *People v. Harris*, and *People v. Bunch*

John Gonzalez was a passenger in a car that was stopped for not having a front license plate.⁴⁰ Without possessing any suspicion of wrongdoing concerning Gonzalez, the officer asked him for identification.⁴¹ Gonzalez produced a traffic ticket in lieu of other identification.⁴² The officer ran a criminal history on Gonzalez and discovered he had a long criminal record.⁴³ Gonzalez then consented to the officer's request to search his person.⁴⁴ After the search recovered cocaine, Gonzalez was arrested and charged with possession.⁴⁵ Prior to trial, he filed a motion to suppress, contending that the police officer

36. *Caballes*, 802 N.E.2d at 203.

37. *Bunch*, 796 N.E.2d at 1026–27.

38. Michael Higgins, *Court Bars Drug-Dog Use in Traffic Stops; 'Hunch' Doesn't Validate Search*, CHI. TRIB., Nov. 21, 2003, § 2, at 1.

39. Timothy P. O'Neill, *5 Reasons Defense Attorneys Should Be Thankful*, CHI. DAILY L. BULL., Dec. 12, 2003, available at http://www.jmls.edu/facultypubs/oneill/oneill_column_1203.shtml.

40. *People v. Gonzalez*, 789 N.E.2d 260, 262 (Ill. 2003), *overruled by* *People v. Harris*, 886 N.E.2d 947 (Ill. 2008).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 262–63.

had no basis for asking for his identification and that the cocaine should be suppressed as fruit of the poisonous tree.⁴⁶

The Illinois Supreme Court began its analysis in the case by noting that a traffic stop is limited by the principles of the “stop-and-frisk” doctrine of *Terry v. Ohio*.⁴⁷ In determining whether the traffic stop was reasonable, the court used the two-prong template established in *Terry*: first, whether the officer’s action in initiating the stop was justified at its inception; and second, whether the officer’s action during the stop was reasonably related in scope to the circumstances that justified the interference in the first place.⁴⁸ This “scope” inquiry depended on two factors: the duration of the stop and the manner in which the stop is conducted.⁴⁹

Using this matrix, *Gonzalez* established that police questioning during a traffic stop is proper if it can be justified by any one of three reasons: first, if the question is related to the initial justification for the stop; second, if it is not so related, if the officer nonetheless had a reasonable, articulable suspicion to justify the question; and third, if neither of these apply, if, in light of all the circumstances and common sense, the question did not impermissibly prolong the detention or change the fundamental nature of the stop.⁵⁰

Gonzalez thus imposed important restrictions on the ability of police to turn simple traffic stops into fishing expeditions for illegal drugs and weapons. It placed both duration and manner restrictions on police activity during traffic stops. Accordingly, *Gonzalez* was a victory for drivers’ and passengers’ rights.⁵¹

The court later applied the test articulated in *Gonzalez* in *People v. Harris*.⁵² In *Harris*, the police stopped a car for an illegal left turn.⁵³

46. *Id.* at 263.

47. *Id.* at 265; *Terry v. Ohio*, 392 U.S. 1 (1968).

48. *Gonzalez*, 789 N.E.2d at 266 (citing *Terry*, 392 U.S. at 19–20).

49. *Id.* at 268–69 (noting that historically Illinois appellate courts have chosen improperly to address solely the temporal nature of a stop to determine whether or not it is reasonable.). The scope of a *Terry* stop is necessarily limited by the manner in which a detention is carried out as well. *Id.*

50. *Id.* at 270.

51. Ultimately, the court ruled that the police were justified in asking the passenger *Gonzalez* for his identification, finding that the question did not temporally extend the stop for the missing license plate. *Id.* It also found that the request did not change the “fundamental nature” of the stop, characterizing the request as “facially innocuous.” *Id.* However, at least one state court would reject this conclusion. See *Washington v. Rankin*, 92 P.3d 202 (Wash. 2004) (asking an automobile passenger for identification without any independent basis for doing so violates the Washington Constitution’s right to privacy).

52. 802 N.E.2d 219 (Ill. 2003), *vacated*, 543 U.S. 1135 (2005).

53. *Id.* at 221.

The police subsequently determined that the driver's license had been either suspended or revoked.⁵⁴ Raymond Harris was a passenger in the car.⁵⁵ The officer who conducted the stop conceded that Harris's behavior had aroused no suspicion.⁵⁶ However, the officer also testified that in order to avoid a possible vehicle impound, his normal practice was to determine if a passenger was legally able to drive the car by requesting identification.⁵⁷ Despite this testimony, at no time did the officer ask the defendant if he was able to drive the car; rather, he merely asked for identification.⁵⁸ The officer then ran Harris's identification card through county dispatch and discovered that Harris had an outstanding warrant.⁵⁹ The arrest and search of Harris produced a rock of cocaine,⁶⁰ and Harris was charged with possession.⁶¹ Before trial, he moved to suppress the cocaine.⁶²

The Illinois Supreme Court analyzed the police behavior against the three-prong test it had recently established in *Gonzalez*.⁶³ First, it held that running the background check on passenger Harris's identification bore no relation to the original reason for the stop—the driver's illegal left turn.⁶⁴ Second, the court found that the officer had conceded that he ran the background check on Harris without any reasonable suspicion of wrongdoing on Harris's part.⁶⁵ Third, it found that the background check was clearly beyond the scope of the traffic stop, for even if it did not prolong the stop temporally, it certainly transformed the nature of the encounter from a routine citation stop into a general investigation of the passenger's past wrongdoings.⁶⁶ Thus, the court quashed Harris's arrest and the fruits of the resulting search.⁶⁷

The Illinois Supreme Court again applied the *Gonzalez* test in *People v. Bunch*.⁶⁸ Bernard Bunch was a passenger in a car stopped because

54. *Id.* at 222.

55. *Id.* at 221.

56. *Id.* at 222.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 226–27.

64. *Id.* at 227.

65. *Id.* at 227–28.

66. *Id.* at 228.

67. *Id.* at 229.

68. 796 N.E.2d 1024, 1029–32 (Ill. 2003).

the officer believed it had a malfunctioning brake light.⁶⁹ After the driver was arrested for failure to produce a driver's license, the officer ordered Bunch to exit the car.⁷⁰ At this point, the officer asked Bunch, "What's your name? Where you coming from?"⁷¹ The officer twice shined a flashlight into Bunch's face and noticed a small, clear plastic item containing a white substance in his mouth. The officer then arrested Bunch and ordered him to spit out the item,⁷² which was later determined to contain heroin.⁷³ After he was charged with possession, Bunch filed a motion to suppress the heroin.⁷⁴

In applying the *Gonzalez* test, the *Bunch* court first determined that the questions the officer asked passenger Bunch were not related to the purpose of the stop, i.e., the driver's operating a motor vehicle without a license.⁷⁵ Second, the questions were not supported by a reasonable, articulable suspicion of Bunch's involvement in criminal activity.⁷⁶ Finally, because the officer had already successfully concluded the purpose of the stop by arresting the driver and arranging for the tow, the questioning improperly prolonged Bunch's detention beyond the purpose of the stop.⁷⁷ Thus, the court quashed Bunch's arrest, suppressed the evidence, and reversed the conviction.⁷⁸

Of the quintet of Fourth Amendment cases, these three—*Gonzalez*, *Harris*, and *Bunch*—dealt with the scope of police questioning during traffic stops. The other two—*People v. Cox*⁷⁹ and *People v. Caballes*⁸⁰—dealt with the use of drug-sniffing dogs during traffic stops.

2. Use of drug-sniffing dogs during traffic stops: *People v. Cox* and *People v. Caballes*

Illinois police have increasingly used drug-sniffing dogs during traffic stops. In *People v. Cox* and *People v. Caballes*, the Illinois Supreme Court addressed the issue of what circumstances would

69. *Id.* at 1026–27.

70. *Id.* at 1027.

71. *Id.*

72. *Id.*

73. *Id.* at 1027–28.

74. *Id.*

75. *Id.* at 1030–31.

76. *Id.*

77. *Id.* at 1031.

78. *Id.* at 1032–33.

79. 782 N.E.2d 275 (Ill. 2002).

80. 802 N.E.2d 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005).

support the use of these dogs on stopped vehicles. In *Cox*, defendant Anne Cox was stopped for a faulty rear registration light.⁸¹ The officer conducting the stop immediately called for a drug-sniffing dog, even though he admitted he had no articulable reason for believing the car contained drugs.⁸² The dog arrived fifteen minutes later while the officer was still writing the ticket.⁸³ The dog alerted the officer to the presence of drugs, and cannabis was eventually found.⁸⁴ Cox was charged with possession.⁸⁵ She filed a motion to suppress.⁸⁶

The Illinois Supreme Court used the United State Supreme Court's *Terry* opinion as the measuring stick for the propriety of the officer's conduct, considering whether the officer's actions were justified at the inception and whether the officer's actions during the stop were properly limited in time and manner.⁸⁷ Applying *Terry*, the Illinois Supreme Court discovered two problems.⁸⁸ First, the police could not articulate a reason why it was necessary to call for a dog.⁸⁹ The police could point to nothing—no smell of marijuana, no suspicious behavior on Cox's part—that would have led to a reasonable belief that the car might contain drugs.⁹⁰ Thus, the officer improperly broadened the "scope" of the traffic stop to include a drug investigation.⁹¹ Second, the court was concerned with the duration of the traffic stop.⁹² The state contended that the fact that the officer was still writing the ticket fifteen minutes after the stop—at the time the dog arrived—meant that the dog-sniff was justified.⁹³ The court found, however, that if the officer had acted "expeditiously," he would have been finished before the dog arrived.⁹⁴ Had he done so, Cox would not have been subjected to the improper search.⁹⁵ Thus, the court suppressed the drug evidence.⁹⁶

81. 782 N.E.2d at 277.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 278–80. Note that *Cox* was decided four months before the Illinois Supreme Court established its *Terry*-driven test in *People v Gonzalez*.

88. *Id.* at 280.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 281.

The court used a slightly different analysis in suppressing the fruits of a drug-sniffing dog search in *People v. Caballes*.⁹⁷ In this case, Trooper Gillette radioed the police dispatcher that he was stopping Caballes for driving 71 mph in a 65-mph zone.⁹⁸ Trooper Graham heard the broadcast and immediately proceeded to the scene with his drug dog.⁹⁹ While Gillette was writing a warning ticket, Graham walked the dog around Caballes's car.¹⁰⁰ The dog alerted the police to the scent of drugs, which were subsequently discovered in the trunk.¹⁰¹

The Illinois Supreme Court suppressed the drugs by relying on the "scope" prong of the *Terry* test that it had also used in *Cox*.¹⁰² It held that Graham's use of the drug-sniffing dog, without any reasonable suspicion of the presence of drugs, improperly broadened the scope of the traffic stop.¹⁰³ Even though the drug dog did not improperly increase the time of the stop, the "scope" prong included not only "time," but also "manner." This is true even though the dog-sniff does not constitute a search under the Fourth Amendment.¹⁰⁴ What is relevant is that the police could give absolutely no reason why they shifted their interest from the speeding charge to whether the car contained drugs.¹⁰⁵ Thus, the use of the dog meant that the police activity impermissibly went beyond the scope of the original reason for the stop.¹⁰⁶

These five Illinois Supreme Court cases drastically curtailed the ability of police to turn pretextual traffic stops into fishing expeditions for drugs and weapons. They created a wall protecting drivers and passengers—especially members of minority groups—from police harassment. Foolishly, however, the Illinois Supreme Court has spent the last few years demolishing that wall.

97. 802 N.E.2d 202, 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005).

98. *Id.* at 203.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 203–04.

103. *Id.* at 204.

104. *United States v. Place*, 462 U.S. 696, 707 (1983) (since dog sniff only reveals whether or not contraband is present, it implicates no reasonable expectation of privacy and is, therefore, not a search under the Fourth Amendment).

105. *See Caballes*, 802 N.E.2d at 205 (noting that the mere fact that the defendant appeared "nervous" was not enough to expand the scope of the stop; in fact, the court went on to state that the officer's actions were nothing more than the result of a "vague hunch").

106. *See id.*

B. 2005–2008: *The Illinois Supreme Court Cuts Back on the Rights of Drivers and Passengers*

During the last several years, the Illinois Supreme Court has dramatically changed course and significantly increased the power of police during traffic stops.

1. The beginning of the end: United States Supreme Court decisions

The tide began to turn when the United States Supreme Court agreed to review the *Caballes* decision in 2005.¹⁰⁷ Recall that the Illinois Supreme Court's decision in *Caballes* stressed that the "scope" of the stop was cabined by two separate factors: "time" and "manner."¹⁰⁸ Even though the dog-sniff did not extend the "time" of the stop, it did change the "manner."¹⁰⁹ Since there was no reasonable suspicion the defendant had drugs, use of the dog violated the Fourth Amendment.¹¹⁰

In overturning *Caballes*, the United States Supreme Court rejected the Illinois Supreme Court's rationale on two grounds. First, it held that in considering the proper "scope" of a stop, "time" was the only relevant consideration, and "manner" was irrelevant.¹¹¹ Thus, since the dog-sniff occurred while the officer was writing the traffic warning, the dog-sniff did not improperly extend the duration of the stop.¹¹² Second, it rejected the Illinois Supreme Court's holding that use of the dog-sniff impermissibly expanded the scope of the stop by turning a traffic violation into a drug investigation.¹¹³ The United States Supreme Court instead held that because the dog-sniff was not a "search"—that is, it did not impact any reasonable expectation of privacy—its use had no Fourth Amendment implications.¹¹⁴

A few weeks later, the United States Supreme Court issued another decision, *Muehler v. Mena*,¹¹⁵ which reiterated that "time," not "manner," determined whether a seizure remained within the proper

107. *Illinois v. Caballes*, 543 U.S. 405 (2005).

108. *Caballes*, 802 N.E.2d at 205.

109. *Id.*

110. *Id.*

111. *Caballes*, 543 U.S. at 408.

112. *Id.*

113. *Id.* at 408–09. The Court quickly dismissed the Illinois Supreme Court's conclusion that the use of the drug-sniffing dog materially changed the nature of the stop into a drug investigation by holding that "conducting a dog-sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog-sniff itself infringed respondent's constitutionally protected interest in privacy." *Id.*

114. *Id.* at 409–10.

115. 544 U.S. 93 (2005).

“scope” under the Fourth Amendment.¹¹⁶ Mena was detained in a house while the police executed a search warrant.¹¹⁷ During this detention, the police asked her about her immigration status—an issue wholly unrelated to the purpose of the search.¹¹⁸ She subsequently filed a section 1983¹¹⁹ lawsuit claiming that the police questioning violated her Fourth Amendment rights because it went beyond the “reasonable manner” prong of the “scope” requirement.¹²⁰

Relying on *Caballes*, the Court first held that Mena was properly seized during the execution of the search warrant and that the questioning did not improperly prolong the seizure.¹²¹ The Court reaffirmed that “time,” and not “manner,” is the only relevant criterion for “scope.” Second, the Court held that mere police questioning did not constitute a per se seizure under the Fourth Amendment.¹²² Thus, similar to the dog-sniff in *Caballes* that was neither a separate search nor seizure, the Court held that as long as the questioning did not actually prolong the original seizure, the police behavior was proper.¹²³

2. The Illinois Supreme Court follows suit

These United States Supreme Court decisions had a ripple effect on the quintet of cases the Illinois Supreme Court decided in 2002-2003. On remand in *People v. Caballes*¹²⁴ (“*Caballes II*”), the Illinois Supreme Court completely abandoned its earlier position and simply “acquiesced in the U.S. Supreme Court’s ruling that, if a traffic stop is proper, police action that does not unreasonably prolong the stop or independently trigger the Fourth Amendment is permissible even if it goes beyond the scope of the stop.”¹²⁵ The Illinois Supreme Court pointedly refused to discuss whether the United States Supreme Court’s

116. *Id.* at 100–01 (holding that police inquiry into an individual’s immigration status absent reasonable articulable suspicion does not constitute a Fourth Amendment seizure unless the duration of the detention exceeds a reasonable amount of time).

117. *Id.* at 95.

118. *Id.*

119. 42 U.S.C. § 1983 (West 2004 & Supp. 2008) (providing a civil action for deprivation of rights).

120. *Mena*, 544 U.S. at 96–97.

121. *Id.* at 101.

122. *Id.* at 100–01.

123. *Id.* at 101–02.

124. 851 N.E.2d 26 (Ill. 2006).

125. *See* *People v. Starnes*, 871 N.E.2d 815, 819–20 (Ill. 2007) (describing the *Caballes II* decision and citing Justice Ginsburg’s dissent from *Illinois v. Caballes* in which she concluded that the Court’s opinion abandoned any rule that police action following a stop must be reasonably related in scope to the justification for the stop (citing *Illinois v. Caballes*, 543 U.S. 405, 420 (2005)).

decision in *Caballes* was a wise or unwise policy; it merely held that “limited lockstep” required it to unquestioningly follow almost any search and seizure decision of the United States Supreme Court.¹²⁶

Moreover, *Caballes II* did more than simply overrule *Caballes I*. Recall that *Gonzalez* held that police activity during a traffic stop runs afoul of the Fourth Amendment if it *either* improperly prolongs the stop *or* if it changes the fundamental nature of the stop. In *Caballes II*, the Illinois Supreme Court—similar to the United States Supreme Court in *Caballes*—simply eliminated “changing the fundamental nature of the stop” as a relevant consideration when examining the “scope” of a stop.¹²⁷ The Illinois Supreme Court thus recognized that “time” was the only relevant factor in the “scope” inquiry.¹²⁸ *Caballes II* “unmistakably, albeit not explicitly,”¹²⁹ abandoned the “changing the fundamental nature of the stop” prong of *Gonzalez*.¹³⁰

Thus, although the Illinois Supreme Court implicitly overruled the “changing the fundamental nature of the stop” prong of *Gonzalez*, it would not explicitly overrule it until March of 2008. Ironically, that occurred as the court was overturning another of the quintet of cases—*People v. Harris*.¹³¹

The Illinois Supreme Court decided *Harris I* in 2003. In 2005, the United States Supreme Court vacated the judgment and remanded for reconsideration in light of the *Caballes* decision.¹³² On remand, the Illinois Supreme Court reversed its ruling in *Harris I*.¹³³ Recall that in *Harris I* the court found that by running a warrant check during the traffic stop on Harris—a passenger—the officer’s actions constituted a fundamental alteration of the nature of the traffic stop.¹³⁴ Thus, based on *Gonzalez*, the court held for Harris.

In *Harris II*, the Illinois Supreme Court noted that the legal terrain had changed. Specifically, the *Harris II* court noted that through its decisions in *Caballes* and *Muehler*, the United States Supreme Court had

126. *Caballes II*, 851 N.E.2d at 39–40.

127. *Starnes*, 871 N.E.2d at 819–20.

128. See generally *Caballes II*, 851 N.E.2d at 31.

129. *Starnes*, 871 N.E.2d at 820.

130. *Id.*

131. 802 N.E.2d 219 (Ill. 2003), *vacated*, Illinois v. Harris, 543 U.S. 1135 (2005) [hereinafter “*Harris I*”].

132. Illinois v. Harris, 543 U.S. 1135 (2005).

133. *People v. Harris*, 886 N.E.2d 947, 957 (Ill. 2008) [hereinafter *Harris II*].

134. 802 N.E.2d at 231.

rejected [the] reasoning that led to this court's adoption of the "fundamental alteration of the nature of the stop" portion of the "scope" prong of *Gonzalez*. All that remains is the duration prong. During a lawful seizure, as occurred in both *Muehler* and *Caballes*, the police may ask questions unrelated to the original detention and are not required to form an independent reasonable suspicion of criminal activity before doing so.¹³⁵

Harris II went on to hold that the warrant check of passenger Harris, like the dog sniff in *Caballes* and the questioning in *Muehler*, neither prolonged the stop nor constituted a separate search or seizure under the Fourth Amendment.¹³⁶ Moreover, the court found that the officer was allowed to question Harris for the same reason the officer was allowed to question the plaintiff in *Mena*.¹³⁷ Therefore, the court affirmed Harris's conviction.¹³⁸

On the same day the Illinois Supreme Court decided *Harris II*, it also decided *People v. Bew*.¹³⁹ *Bew* expressly reconsidered *Cox*'s rule that, for a canine sniff to be valid under the Fourth Amendment, officers must not only have "specific and articulable facts" that justify the sniff, but the stop itself must not be prolonged by the sniff.¹⁴⁰ *Bew* held that, based on *Caballes II*, it was clear that a dog sniff of a car was always proper so long as it did not improperly prolong the stop. Thus, the "specific and articulable" prong of *Cox* was overruled.

3. The state of the law today

The Illinois Supreme Court's turnaround in the area of traffic stops has been stunning. First, *Caballes I* was reversed by the United States Supreme Court and subsequently overruled by the Illinois Supreme Court in *Caballes II*. Second, *Harris I* was overruled by the Illinois Supreme Court in *Harris II*. Third, the "articulable suspicion" prong of *Cox* was overruled by the Illinois Supreme Court in *Bew*. Finally, the "fundamental alteration of the nature of the stop" part of the "scope" prong that was established in *Gonzalez* was overruled in *Harris II*.¹⁴¹

135. *Harris II*, 886 N.E.2d at 960. For a recent example of a traffic stop that was found to have been unreasonably prolonged, see *People v. Bernstein*, 890 N.E.2d 1225, 1231-32 (Ill. App. Ct. 2008) (holding that under the circumstances a 28-minute traffic stop was unreasonable), *vacated*, 896 N.E.2d 1061 (Ill. 2008).

136. *Harris II*, 886 N.E.2d at 960.

137. *Id.* at 961.

138. *Id.* at 964.

139. *People v. Bew*, 886 N.E.2d 1002 (Ill. 2008).

140. *Id.* at 1007.

141. The Illinois Supreme Court has had no reason to reexamine its decision in *People v. Bunch*. But to the extent that *Bunch* may have been based on the stop being improperly

Brick by brick, the Illinois Supreme Court dismantled the impressive edifice it erected in 2002-03.

And let's be clear about one fact: the Illinois Supreme Court did not have to overrule *any* of these cases. In our federal system, the state's highest court has every right to find that the Illinois Constitution offers more protection to Illinois citizens than does the Fourth Amendment of the Federal Constitution. Therefore, the Illinois Supreme Court was not obligated to adopt the United States Supreme Court's Fourth Amendment rulings in *Caballes* and *Muehler*.¹⁴² Instead, the court could have found that Article I, Section 6 of the Illinois Constitution provides increased protection to Illinois drivers and passengers.¹⁴³

However, the Illinois Supreme Court adopted the exact holdings of the United States Supreme Court and employed the *faux* legal doctrine of "limited lockstep"¹⁴⁴ as its justification for doing so. This doctrine is an excuse for the court to do no independent thinking once the United States Supreme Court has decided a search and seizure issue. I have criticized the Illinois Supreme Court's use of this doctrine in an earlier

prolonged, that case may still be good law. *See supra* notes 68-78 and accompanying text (discussing the Illinois Supreme Court's application of the *Gonzalez* test in deciding *People v. Bunch*).

142. *See People v. Tisler*, 469 N.E.2d 147, 156 (Ill. 1984) (acknowledging that the Illinois Supreme Court is free to interpret the state constitution differently from the Federal Constitution). Moreover, at least one state supreme court has found that *Caballes* and *Muehler* are not even applicable to the scope of a *Terry* stop. *See State v. Smith*, 184 P.3d 890, 902 (Kan. 2008) (holding that the appellate court erred in relying on *Mena* in expanding the scope of a traffic stop). In *Smith*, the Kansas Supreme Court held that law enforcement officers may not expand the scope of a routine traffic stop to include a search that is unrelated to the purpose of the stop, even if the defendant consents. *Id.* According to the court, consensual searches during a traffic stop are unconstitutional under the Fourth Amendment of the United State Constitution and section 15 of the Kansas Constitution Bill of Rights. *Id.*

143. Article I, Section 6 of the Illinois Constitution provides:

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILL. CONST. OF 1970, art. I, § 6 (1970).

144. A state supreme court uses the limited lockstep doctrine when it employs the United States Supreme Court's interpretation of the Federal Constitution to a state constitution, even though the state supreme court could add additional protections to its constitution. *Caballes II*, 851 N.E.2d 26, 31 (Ill. 2006). The Illinois Supreme Court in *Caballes II* declined to disturb its tradition of following this doctrine under principles of *stare decisis*, and "because the limited lockstep approach continues to reflect our understanding of the intent of the framers of the Illinois Constitution of 1970." *Id.* at 44-45. As a result, the court in *Caballes II* held that the search and seizure provision of the Illinois Constitution should be understood in the exact same manner that the United States Supreme Court interprets the Fourth Amendment. *Id.* at 46.

article,¹⁴⁵ and will not repeat all the arguments here. In any event, in following the “limited lockstep” doctrine, a state court exhibits no understanding of its role in the federal system. When the United States Supreme Court issues a holding on the meaning of the Fourth Amendment, it is merely setting the minimum constitutional floor that all states have to respect. By definition, it must be a “one-size-fits-all” rule that applies to Vermont and North Dakota, as well as California and New York. By blindly accepting a national ruling intended to work in Vermont and North Dakota, the Illinois Supreme Court perversely insists on buying law “off the rack.” It ignores the fact that the federal system allows Illinois to have laws tailored to fit the particular problems in Illinois.¹⁴⁶ For example, Vermont and North Dakota may not have a “driving while black” problem for the simple reason that they have very few blacks.¹⁴⁷ Thus, the “limited lockstep” doctrine is the Illinois Supreme Court’s excuse for not fine-tuning constitutional law to fit the realities of life in Illinois.¹⁴⁸

Assuming the Illinois Supreme Court will continue to follow “limited lockstep” in search and seizure cases, the real issue is what this now means for Illinois drivers and passengers—especially those who are minorities.

145. See Timothy P. O’Neill, “*Stop Me Before I Get Reversed Again*”: *The Failure of Illinois Appellate Courts To Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 914 (2005).

146. The U.S. Supreme Court’s constitutional interpretations create a floor, not a ceiling, of rights. A state is always free to grant more rights to its citizens, but it is not allowed to go under the floor, i.e., grant fewer rights to its citizens through a more pro-prosecution ruling. See *Michigan v. Long*, 463 U.S. 1032, 1038–40 (1983) (discussing whether a review of state law to determine if state courts have utilized federal law to support their decisions establishes an adequate and independent ground for judgment).

147. According to the U.S. Census Bureau’s report issued in August of 2001, African Americans comprised approximately 15% of the total population in Illinois as compared to 0.5% in Vermont and 0.6% in North Dakota. JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2000* (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

148. The U.S. Supreme Court recently demolished the recurrent argument that there is a value in states having uniform interpretations of constitutional issues in criminal law:

This interest in uniformity, however, does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. The fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—so long as they do not violate the Federal Constitution—is not otherwise limited by any general, undefined federal interest in uniformity. Nonuniformity is, in fact, an unavoidable reality in a federalist system of government.

Danforth v. Minnesota, 128 S. Ct. 1029, 1041 (2008).

II. TRAFFIC STOPS, DOG SNIFFS, CONSENT SEARCHES, AND MINORITIES: THE CURRENT IMPACT OF ILLINOIS LAW THROUGH A HYPOTHETICAL CASE

The impact of the Illinois Supreme Court's decisions cannot be underestimated. To illustrate, consider "Officer Smith," a hypothetical police officer in an all-white Chicago suburb. Officer Smith is an admitted racist. His personal policy is to ignore routine traffic offenses by anyone driving a car exhibiting the all-white suburb's city sticker. Instead, he enforces traffic laws only against out-of-town vehicles with drivers who appear to be black or Latino.

It is important to understand that Officer Smith only stops drivers who actually violate a traffic law. He never makes a stop that is not based on probable cause. In order to do this, he strictly enforces all traffic offenses committed by out-of-town drivers who appear to be racial minorities. And to discover such offenses, he carefully follows all such drivers traveling through the suburb with the purpose of seeing whether they violate any such law.

Officer Smith avidly reads new Illinois cases for ideas for traffic stops. In fact, he is keenly aware of a variety of actions that have justified traffic stops. He was happy to see that the Illinois Supreme Court recently validated a traffic stop based on a car stopping with its front tires in the crosswalk.¹⁴⁹ He knows of two recent cases in which traveling 71 mph in a 65-mph zone supported a traffic stop¹⁵⁰—although there is no reason why going even 1 mph over the limit would not also qualify. He is cognizant of the burned-out-light-over-the-license-plate offense.¹⁵¹ He knows courts have upheld officers stopping cars for having a tinted rear license plate cover.¹⁵² Air fresheners and fuzzy dice hanging from the rear view mirror can warrant a stop.¹⁵³

149. See *People v. Bew*, 886 N.E.2d 1002, 1004 (Ill. 2008) (discussing the position of the defendant's car during the traffic stop); see also *People v. Wood*, 883 N.E.2d 620, 622 (Ill. App. Ct. 2008) (noting that violation occurred when the front portion of the vehicle was over the stop line at an intersection).

150. *People v. Roa*, 879 N.E.2d 366, 367 (Ill. App. Ct. 2007), *vacated and remanded*, 896 N.E.2d 790 (Ill. 2008); *People v. Caballes*, 851 N.E.2d 26, 29 (Ill. 2006).

151. *People v. Cox*, 782 N.E.2d 275, 277 (Ill. 2002), *overruled on other grounds by People v. Bew*, 886 N.E.2d 1002 (Ill. 2008) (explaining that the defendant was stopped by police for not having a rear registration light); cf. *People v. Bailey*, 639 N.E.2d 1278, 1279 (Ill. 1994) (defendant's car was stopped by police for having no front license plate).

152. *People v. Mendoza*, 846 N.E.2d 169, 171 (Ill. App. Ct. 2006) (noting that the defendant's tinted rear license plate cover and a bandanna hanging from the rear view mirror obstructing his view caused the traffic stop), *rev'd on other grounds by* 898 N.E.2d 603 (Ill. 2008.).

153. *People v. Young*, 843 N.E.2d 489, 490 (Ill. App. Ct. 2006). However, not all air fresheners are of a size that "materially obstructs" the driver's view. See *People v. Johnson*, 893 N.E.2d 275, 280 (Ill. App. Ct. 2008) (holding that an officer's belief that the presence of a

And, if all else fails, he is likely to observe some kind of improper lane usage if he follows a car long enough.¹⁵⁴

To reiterate: Officer Smith never pulls over a minority driver unless the driver has actually committed a traffic violation. However, Officer Smith says it is rare to see a driver execute a perfect stop at an intersection with a stop sign. And, he says with a wink, “Who needs a vagrancy law when you have an entire traffic code?”

Does Officer Smith’s racially-based law enforcement policy violate the Fourth Amendment? No, because the United States Supreme Court has told us that the test for a Fourth Amendment violation is purely objective; the subjective state of mind of the officer is completely irrelevant.¹⁵⁵ And even if Smith’s racially-biased enforcement violates the Equal Protection Clause, exclusion of evidence in a criminal case may not even be a possible remedy.¹⁵⁶

To begin, assume that Officer Smith makes a legal traffic stop based on probable cause that the driver has committed a traffic offense. First, he can order the driver and any passengers out of the car without any reason other than to ensure the officer’s safety.¹⁵⁷ Second, he may legally arrest the driver, so long as state law says it is an offense warranting arrest. However, there is absolutely no offense so minor that an arrest for it will be improper under the Fourth Amendment.¹⁵⁸ It is

“cherry” air freshener observed briefly at night was a material obstruction was not reasonable or justifiable); *see also Mendoza*, 846 N.E.2d at 171 (interpreting 625 ILL. COMP. STAT. 5/12-503(c) as forbidding objects in vehicles that materially obstruct the driver’s view).

154. *See People v. Salinas*, 891 N.E.2d 884, 887 (Ill. App. Ct. 2008) (defendant was pulled over for failing to use a turn indicator to shift lanes); *People v. Schaefer*, 796 N.E.2d 686, 688 (Ill. App. Ct. 2003) (traffic stop initiated because defendant’s car wheels crossed over left lane marker by twelve inches).

155. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“We think these cases [*United States v. Robinson*, 414 U.S. 218 (1973), and *Scott v. United States*, 436 U.S. 128 (1978)] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

156. *Compare United States v. Nichols*, 512 F.3d 789, 794 (6th Cir. 2008) (explaining that the exclusionary rule is customarily applied to Fourth Amendment violations and suppression is not a remedy under the Fourteenth Amendment), *with Commonwealth v. Lora*, 886 N.E.2d 688, 699 (Mass. 2008) (holding that suppression is allowed under the state constitution’s Equal Protection Clause).

157. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (explaining that the “de minimis” intrusion against the driver weighed against legitimate safety concerns for officers justifies an officer’s order for a driver to get out of the car); *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997) (employing the same reasoning as *Mimms* to equip officers with the ability to also order passengers out of the car). Additionally, if the officer reasonably believes that any person in the car is armed and presently dangerous, he may frisk that person for weapons. *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009).

158. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (explaining, in regard to the propriety of an arrest for a seatbelt violation, that “[i]f an officer has probable cause to believe

even proper for the local law to give the officer discretionary, rather than mandatory, authority to arrest citizens for even the most minor offenses.¹⁵⁹ And even if Officer Smith violates local law by arresting a driver or a passenger for an offense that local law provides is *not* an offense justifying arrest, the Fourth Amendment does not provide for suppression of the resulting evidence.¹⁶⁰

Third, once the officer arrests an occupant of the vehicle, he may make a complete search of the person.¹⁶¹ Based solely on the arrest, he may then make a complete search of the passenger compartment of the car, including all containers in the passenger compartment.¹⁶² Fourth, once the arrestee is booked and incarcerated at the police station, the police may conduct an inventory of his possessions.¹⁶³ After his incarceration, the police may even take a warrantless “second-look” search of his person if they believe they have missed something.¹⁶⁴ Finally, if the vehicle has been impounded, the police have the right to perform a complete inventory, provided they follow the standard procedures established in the jurisdiction.¹⁶⁵

All of this is allowable if Officer Smith decides to arrest one of the occupants of the car. If, on the other hand, the officer merely gives a

that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”).

159. *Gustafson v. Florida*, 414 U.S. 260, 263–66 (1973) (holding that arrest and subsequent search of the petitioner for the “benign or trivial” offense of driving an automobile without a valid license was valid).

160. *Virginia v. Moore*, 128 S. Ct. 1598, 1608 (2008) (“But the arrest rules that the officers violated were those of state law alone, and as we have just concluded, it is not the province of the Fourth Amendment to enforce state law.”).

161. *See United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that a lawful arrest establishes the authority to fully search the person).

162. *See Thornton v. United States*, 541 U.S. 615, 623 (2004) (“Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.”); *see also New York v. Belton*, 453 U.S. 454, 462–63 (1981) (finding the search of a jacket located inside the passenger compartment of the car following the defendant’s arrest was valid). The U.S. Supreme Court is currently re-examining whether the arrest of the occupant of a vehicle per se should automatically justify a complete search of the passenger compartment. *Arizona v. Gant*, 162 P.3d 640 (Ariz. 2007), *cert. granted*, 128 S. Ct. 1443 (Feb. 25, 2008) (No. 07-542).

163. *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (“At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed.”).

164. *United States v. Edwards*, 415 U.S. 800, 806–08 (1974) (once in custody, further examination of the arrestee’s clothes was reasonable because probable cause linked the clothes to the specific crime).

165. *See Colorado v. Bertine*, 479 U.S. 367, 375–76 (1987) (asserting that nothing prohibits police from exercising discretion in deciding to impound a person’s vehicle when it is in accordance with standard criteria and its basis is on something other than suspicion of criminal activity).

citation or a warning, his authority is a bit more limited. But with the Illinois Supreme Court overruling its decisions in *Caballes*, *Cox*, *Harris*, and *Gonzalez*, he has much more leeway than he did five years ago.

The stop *per se* gives Officer Smith the right to order the driver and passengers out of the car.¹⁶⁶ Further, he now has the right to use the stop as a pretext to “fish” for additional information. He can ask questions of the driver and the passengers completely unrelated to the stop, even without any reasonable suspicion; this may include questions about drugs, weapons, and contraband.¹⁶⁷ He can run warrant checks on the driver and passengers without any reasonable suspicion.¹⁶⁸ He can perform dog-sniff inspections of the vehicle without any reasonable suspicion.¹⁶⁹ He can ask consent to search the driver, passengers, and vehicle without any reasonable suspicion. The only constraint on the officer’s activity is “time.” As long as the officer’s actions take place while he is properly preparing the warning or citation, all of this activity is proper in Illinois.

Clearly, all of this is troubling. But it is even more troubling to see how these tactics are actually used by Illinois police officers. The next Part will examine a recent case that illustrates the problematic manner in which officers are applying these rules on Illinois highways.

III. THE ANATOMY OF A PRETEXTUAL STOP: *PEOPLE V. ROA*

The hypothetical discussed in the previous Part is actually quite realistic. This Part will discuss a recent case decided by the Third District Appellate Court involving a traffic stop: *People v. Roa*.¹⁷⁰ The facts are common to many Illinois cases: a traffic stop for a minor

166. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997).

167. *Harris II*, 886 N.E.2d 947, 960 (Ill. 2008) (“During a lawful seizure, as occurred in both *Muehler* and *Caballes*, the police may ask questions unrelated to the original detention and are not required to form an independent reasonable suspicion of criminal activity before doing so.”).

168. *Id.* at 957–58.

169. *People v. Bew*, 886 N.E.2d 1002, 1007 (Ill. 2008).

170. 879 N.E.2d 366 (Ill. App. Ct. 2007), *vacated and remanded*, 896 N.E.2d 790 (Ill. 2008). On November 26, 2008, the Illinois Supreme Court denied the defendant’s petition for leave to appeal, but vacated and remanded the case to the Third District. The Illinois Supreme Court directed the Third District to reconsider its decision in light of its recent decision in *People v. Cosby*, 898 N.E.2d 603 (Ill. 2008). *Cosby* dealt with the issue of whether, once a traffic stop ends, an officer’s subsequent request to search a vehicle constitutes a new seizure under the Fourth Amendment. 898 N.E.2d at 612. The *Roa* case is currently under consideration in the Third District. Regardless of the Third District’s eventual decision, the majority and dissenting opinions of the vacated decision that are discussed in this Article continue to offer valuable insights into pretextual stops in Illinois.

offense; the driver allegedly consents to a search of the vehicle; drugs are found. The majority in *Roa* held that the officer's questioning and request for consent to search the defendant's vehicle following the conclusion of a traffic stop were legal.¹⁷¹ What is different about this case, however, is a dissenting opinion that dares to look beyond the surface of the case to reveal what is really involved: a pretextual traffic stop made for the purpose of conducting a drug investigation without either probable cause or reasonable suspicion.¹⁷² After discussing the dissenting opinion, this Part will then turn to recent empirical evidence showing how pretextual stops disparately impact minority drivers and passengers in Illinois.

A. *The Danger of Curtailing Constitutional Protections in Pretextual Traffic Stops: The Dissent in People v. Roa*

In *Roa*, Andres Roa was pulled over for speeding on I-80 by Sgt. Floyd Blanks.¹⁷³ Blanks told him that he was going to issue a written warning.¹⁷⁴ Blanks then returned to his squad car, ostensibly to prepare the warning.¹⁷⁵ When he returned and gave Roa the warning, Blanks asked several questions before asking Roa for permission to search the car. Roa agreed.¹⁷⁶ Another officer soon arrived on the scene, and he and Blanks proceeded to conduct a twenty-minute search.¹⁷⁷ With the use of a fiber-optic scope, the officers discovered twenty-four pounds of cocaine hidden in the car.¹⁷⁸ Roa was subsequently convicted and sentenced to fifteen years in the penitentiary.¹⁷⁹ The Third District Appellate Court affirmed, finding the search legally proper.¹⁸⁰

171. 879 N.E.2d at 376.

172. *Id.* at 378–79 (McDade, J., dissenting).

173. *Id.* at 367 (majority opinion).

174. *Id.* at 368.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 369–70.

180. Two justices agreed that the search was proper, but each arrived at this conclusion through a different route. Justice Wright held that the conversation between Blanks and Roa after the issuance of the written warning constituted a second seizure which needed to be independently justified. *Id.* at 373. She held that it was so justified, pointing to Roa's nervous behavior and the strong odor of air freshener during Blanks' first confrontation with Roa. *Id.* at 374. She went on to find that Roa voluntarily consented to the search. *Id.* at 376. Justice Lytton, specially concurring, did not agree that Blanks' second conversation constituted a second seizure. *Id.* at 377 (Lytton, J., concurring). Other than this, he agreed with Justice Wright's reasoning and conclusion. *Id.*

On the surface, *Roa* looks no different from dozens of other traffic stop cases: officer stops driver, driver “voluntarily consents” to show officer his contraband drugs, and driver gets fifteen years in Stateville. While a layperson might well find this story implausible, it is a tale that the American judicial system buys thousands of times a year.

What makes *Roa* so interesting is not the run-of-the-mill decision affirming the validity of the search, but rather the insightful dissent of Justice Mary McDade.¹⁸¹ Justice McDade actually had the audacity to suggest that the emperor may be lacking some clothes.

First, she noted that this was no ordinary traffic stop for speeding.¹⁸² The defendant was clocked at 71 mph in a 65-mph zone.¹⁸³ Justice McDade chided her colleagues for refusing to concede the obvious: “Blanks did not stop Andres Roa for driving six miles over the speed limit because he wanted to keep the highway safe for other motorists. The fact is that he is a drug interdiction officer and as such he cruises the interstate trolling for drug offenders.”¹⁸⁴ In fact, at the suppression hearing Blanks admitted that he had made around 3,000 drug interdiction stops in his seventeen-year career.¹⁸⁵ Justice McDade thus argued that this so-called traffic stop “was nothing more than subterfuge from the outset.”¹⁸⁶

Justice McDade conceded, of course, that pretextual stops do not violate the Fourth Amendment.¹⁸⁷ But her point was far subtler. She contended that an officer making a bona fide traffic stop will see things differently from an officer who is conducting a drug interdiction stop on the pretext of a traffic violation.¹⁸⁸ Thus, “[f]or an officer already convinced that he is dealing with a drug courier, objectively innocent behavior morphs into indicators of criminal behavior: nervousness and fumbling can easily become ‘extreme’ or ‘excessive,’ a simple air freshener becomes a masking agent and magically provides reasonable articulate suspicion of drug dealing.”¹⁸⁹ In other words, the officer’s

181. *Id.* at 378 (McDade, J., dissenting).

182. *Id.* at 378.

183. *Id.*

184. *Id.* at 379.

185. *Id.* at 382.

186. *Id.* at 379.

187. *Id.* (“Technically even one mile per hour over the speed limit constitutes the requisite probable cause.”).

188. *Id.* (noting that in the latter case the officer is “viewing the defendant and the vehicle with the purpose of finding an excuse to search and of vindicating his original belief that the driver is a drug courier”).

189. *Id.*

mindset automatically casts a “sinister patina” over his ordinary observations.¹⁹⁰

This led Justice McDade to a troubling fact that many judges simply refuse to confront. Specifically, because Fourth Amendment law is mostly developed through cases reviewing suppression motions and the possible use of the exclusionary rule, the police in these cases never come up empty-handed. By definition, the police have had to either be correct, or at least lucky, in every single review of a suppression hearing.

This simple, but often-overlooked, fact has serious implications. The majority in *Roa* correctly pointed out that the United States Supreme Court has held that reviewing courts owe deference to the experience and specialized training of police officers when evaluating whether an officer’s observations result in reasonable suspicion.¹⁹¹ Yet Justice McDade reminds us that, by definition, reviewing courts are only able to apply this presumption in cases where the police have actually found incriminating evidence.¹⁹² Thus, the universe of cases in which the presumption is used is automatically rigged in favor of the police. McDade continued:

As judges, we get a false sense of the reliability . . . [of the indicators police] use in profiling drivers. The only time these stops come to our attention is when contraband is actually found during a search of the vehicle. *It tends to appear, therefore, that the law enforcement officers are right one hundred percent of the time.*¹⁹³

McDade conceded that Blanks testified that as a drug interdiction officer he had probably made 1000 successful interdiction stops.¹⁹⁴ However, she pointed out that Blanks admitted he had probably made 2000 unsuccessful stops.¹⁹⁵ Yet judges reviewing suppression motions never see those 2000 stops where the police come up empty-handed.¹⁹⁶

190. *Id.*

191. *Id.* at 375 (majority opinion) (the totality-of-the-circumstances approach “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person’” (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002))). The majority also cited to *United States v. Cortez*, 449 U.S. 411, 418 (1981), for a similar proposition: “[t]he inquiry for the trial court was whether this officer, not just any officer, had a reasonable, articulable suspicion for the second seizure.” *Id.*

192. *Roa*, 879 N.E.2d at 382 (McDade, J., dissenting).

193. *Id.* (emphasis added).

194. *Id.*

195. *Id.*

196. *Id.* at 382–83.

Finally, McDade questioned whether Roa actually consented to the scope of the extensive search carried out.¹⁹⁷ She found insufficient evidence that Roa had consented to the search of the entire car, rather than just the trunk.¹⁹⁸ Yet, even if he consented to the search of the “car,” she argued that a reasonable motorist would believe that this merely entailed the officers looking at the seats and floor of the car, and perhaps in the glove compartment.¹⁹⁹ Instead, the officers in question conducted a twenty-minute search with a fiber-optic scope that resulted in “the virtual dismantling of the vehicle on the side of the highway.”²⁰⁰ A reasonable person, McDade noted, would not have believed such a search could be made without a warrant.²⁰¹

Roa is a textbook example of a pretextual traffic stop. Clearly, Sergeant Blanks was not interested in the fact that Roa was driving six miles per hour over the speed limit.²⁰² Indeed, Blanks would not have stopped Roa unless he had a hunch that Roa was carrying drugs.²⁰³ Why Roa? We can only speculate about his possible ethnicity. But we do know that Blanks’ job was to look for drugs.²⁰⁴ This is what is so dangerous about pretextual stops: once the stop is made, there is a strong tendency that the officer will view everything through a lens that assumes drugs are present.²⁰⁵

B. Beyond Roa: Studies of Racial Bias in Illinois Traffic Stops

The *Roa* case is not an anomaly. In fact, recent studies indicate a regular practice of pretextually stopping minority drivers in order to have them “voluntarily” consent to a search of the vehicle. Five years ago, the Illinois legislature mandated a study to identify racial bias in traffic stops.²⁰⁶ Law enforcement agencies are required to keep details of traffic stops, including the race of the driver.²⁰⁷ The Northwestern

197. *Id.* at 385–86.

198. *Id.* at 385. The scope of a consensual search is cabined by what a reasonable person would have expected the search to entail. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

199. *Roa*, 879 N.E.2d at 386 (McDade, J., dissenting).

200. *Id.*

201. *Id.*

202. *Id.* at 379.

203. *Id.* at 375–76 (majority opinion).

204. *Id.* at 367.

205. *Id.* at 378–79 (McDade, J., dissenting).

206. 625 ILL. COMP. STAT. 5/11-212 (2007).

207. *Id.* The statute provides:

(a) Whenever a State or local law enforcement officer issues a uniform traffic citation or warning citation for an alleged violation of the Illinois Vehicle Code [625 ILCS 5/1-100 et seq.], he or she shall record at least the following:

University Center for Public Safety, in conjunction with the Illinois Department of Transportation, has issued four yearly reports, with its most recent report analyzing statistics from 2007.²⁰⁸

In 2007, police officers from more than 939 law enforcement agencies in Illinois requested 26,765 consent searches of motor vehicles.²⁰⁹ Consent was granted in 24,312 cases (or 91% of the time).²¹⁰ The rate of consent showed almost no difference between the five ethnic groups studied—Caucasian, African-American, American Indian, Hispanic, and Asian. Each group consented to vehicle searches around 91% of the time.²¹¹

Of those who consented, police actually went on to search the vehicle in 23,395 cases.²¹² The report notes that, “As in past years, in 2007 consent searches were conducted disproportionately by race.”²¹³ In 2007, a Hispanic driver was 2.4 times more likely to be the subject of a consensual vehicle search than a Caucasian driver, and an African-American driver was about three times as likely to undergo such a search.²¹⁴

Even more troubling are the results of the searches. The study calculated the “hit rate” (the likelihood that a consent search resulted in the seizure of contraband) on Caucasian drivers as 24.56%, while it was

(1) the name, address, gender, and the officer's subjective determination of the race of the person stopped; the person's race shall be selected from the following list: Caucasian, African-American, Hispanic, Native American/Alaska Native, or Asian/Pacific Islander

Id. at (a)(1).

208. See NORTHWESTERN UNIVERSITY CENTER FOR PUBLIC SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY: 2007 ANNUAL REPORT (2007), <http://www.dot.il.gov/travelstats/2007%20Illinois%20Traffic%20Stops%20Statistics%20Study%20Final%20Report.pdf>.

Originally, the project's data collection was scheduled to end on December 31, 2007. *Id.* at 2. However, Illinois Public Act 094-0997, effective January 1, 2008, not only extended the collection time, but also asked the new Racial Profiling Prevention and Data Oversight Board to evaluate the necessity of mandatory data collection. *Id.* at 2. Its recommendation is due no later than January 2010. *Id.* at 2. See also Illinois General Assembly Legislation and Laws, Pub. Act 094-0997 (extending the scope of the Illinois Traffic Stops Statistics Study), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=094-0997>.

209. NORTHWESTERN UNIVERSITY CENTER FOR PUBLIC SAFETY, *supra* note 208, at 4, 10. The report compiled data on 2,450,986 traffic stops conducted by 939 law enforcement agencies. *Id.* at 4.

210. *Id.* at 10.

211. *Id.*

212. *Id.* This number constitutes less than one percent of all traffic stops made in Illinois in 2007. *Id.*

213. *Id.*

214. *Id.* In Chicago in 2007, minority drivers were about five times more likely than Caucasians to undergo consent searches. Monique Garcia & Darnell Little, *Profiling 'Consent Searches,'* CHIC. TRIB., July 27, 2008, § 4, at 1.

only 12.93% for minority drivers.²¹⁵ The conclusion is stark: although minority drivers were about 2.5 times more likely to be the subject of a consent search, they were only *half* as likely to have contraband in their vehicles.²¹⁶

Another way to relate race to the “hit rate” is to consider “conditional probability.”²¹⁷ This is calculated by dividing the probability of finding contraband by the probability of being consent-searched.²¹⁸ For Caucasian drivers, the conditional probability of finding contraband, given the probability of being searched, is 41%.²¹⁹ For minority drivers, the conditional probability is 8%.²²⁰ As the report concludes, “[p]olice officers conducting consent searches are far more likely to find contraband in a vehicle driven by a Caucasian driver than by a minority driver.”²²¹

The numbers are even starker when only the traffic stops made by the Illinois State Police are considered. African-American and Hispanic drivers are three times more likely than Caucasians to be the object of consent searches performed by the Illinois State Police. Yet the Illinois State Police’s “hit rate” on Caucasian drivers is almost twice that of African-American drivers, and *eight times* that of Hispanic drivers.²²²

The empirical evidence shows that the issue is not whether Illinois has a problem with pretextual stops; the issue is what can be done to remedy the situation. The next Part discusses possible approaches.

IV. TWO PROPOSED REMEDIES

One thing is clear: a solution to the problem cannot be found in the Illinois Supreme Court. As discussed in Part I, the court’s fixation on “limited lockstep” in the area of search and seizure has resulted in the dismantling of its sophisticated case law from 2002–2003 that effectively curbed police “fishing expeditions” during routine traffic stops.²²³ From now on, as long as the court’s search and seizure rulings refuse to deviate from the United States Supreme Court’s “one-size-fits-

215. NORTHWESTERN UNIVERSITY CENTER FOR PUBLIC SAFETY, *supra* note 208208, at 11.

216. *Id.* at 10–11.

217. *Id.* at 12.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. American Civil Liberties Union, Consent Searches – Illinois State Police, http://www.aclu-il.org/news/Consent_Searches_2007-ISP.pdf (last visited Mar. 25, 2009).

223. See *supra* Part I (discussing the change in curbing pretextual traffic stops and consensual vehicle searches in the Illinois Supreme Court from 2002–2008).

all-states” Fourth Amendment decisions, the Illinois Supreme Court will continue to be part of the problem rather than the solution.

Nevertheless, there are two areas of Illinois traffic stop law that can be improved. First, the Illinois legislature should amend the Illinois Code of Criminal Procedure by codifying rules of behavior for police conducting routine traffic stops. Second, either the legislature or the governor should abolish the use of consent searches during traffic stops.

A. Solution 1: Ask the Legislature to Codify the Gonzalez Test

The precedent for this solution is found in the Illinois Code of Criminal Procedure’s codification of *Terry v. Ohio*.²²⁴ Section 107-14 essentially turned the *Terry* decision into a statute in 1968.²²⁵ In fact, it became law just months after the United States Supreme Court decided *Terry*.²²⁶

Codifying the *Gonzalez* test—including its now-overruled provision forbidding the police to change the fundamental nature of the stop without probable cause or reasonable suspicion—would go a long way towards limiting police abuses during traffic stops. As discussed in Part I, the Illinois Supreme Court in *Gonzalez* created a three-part test for evaluating the legality of police behavior during a traffic stop.²²⁷ When evaluating the legality of police tactics during a stop (e.g., asking for identification, questioning the driver and passengers, running background checks of passengers), *Gonzalez* held that the behavior is proper only if it can be justified by any one of three reasons: first, if the question is related to the initial justification for the stop; second, if it is not so related, if the officer nonetheless had a reasonable, articulable suspicion to justify the question; third, if neither of these apply, if, in the light of all the circumstances and common sense, the question did not

224. *Terry v. Ohio*, 392 U.S. 1 (1968).

225. 725 ILL. COMP. STAT. 5/107-14. The statute provides:

Temporary questioning without arrest. A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense as defined in Section 102-15 of this Code [725 ILCS 5/102-15], and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

Id.

226. *Terry* was decided on June 10, 1968. *Terry*, 392 U.S. at 1. The Illinois statute became effective on August 21, 1968. 725 ILL. COMP. STAT. 5/107-14.

227. *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), *overruled by* *People v. Harris*, 886 N.E.2d 947 (Ill. 2008).

impermissibly prolong the detention or change the fundamental nature of the stop.²²⁸

The problem is that the Illinois Supreme Court overruled the most significant part of the test. In *Harris II*,²²⁹ the court held that the “fundamental nature of the stop” prong was no longer a relevant consideration in deciding whether the police behavior went beyond the scope of the stop.²³⁰ Relying on the United States Supreme Court’s decisions in *Caballes* and *Mena*, the court held that the only relevant factor is the “time” factor (i.e., whether the police behavior impermissibly prolonged the duration of the stop).²³¹ This now frees the police to use traffic violations as a pretext to do background checks of the driver and passenger, use a drug-sniffing dog, or ask consent for a vehicle search based on absolutely no reasonable suspicion—as long as the activity is confined to the actual time needed to prepare a warning or ticket.

The codification of the unwisely-discarded test in *Gonzalez* would go a long way towards curbing police fishing expeditions during traffic stops of minority drivers in Illinois.

B. Solution 2: Abolish Consent Searches

The second reform should be to abolish consent searches of motor vehicles during routine traffic stops in Illinois. Several years ago this would have been considered a radical idea.²³² However, recently a coalition of seven Illinois groups joined in a letter to the governor asking him to order the Illinois State Police to refrain from requesting and performing consent searches of vehicles during routine traffic stops.²³³ Presenting the data on consent searches discussed in Part III, the letter stated: “[T]he conclusion is obvious—consent searches are an

228. *Id.* at 270.

229. *People v. Harris*, 886 N.E.2d 947 (Ill. 2008).

230. *Id.* at 961.

231. *Id.* at 960–61.

232. *See, e.g., George C. Thomas III, Terrorism, Race and a New Approach to Consent Searches*, 73 *MISS. L.J.* 525, 526–27 (2003) (urging the abolition of consent searches except in cases of public safety).

233. Letter from American Civil Liberties Union of Illinois et al., to Rod R. Blagojevich, Governor of Illinois (July 24, 2008), available at http://www.aclu-il.org/news/Letter_to_Governor-7-08.pdf [hereinafter Letter to Rod R. Blagojevich]. The letter was signed by the American Civil Liberties Union of Illinois, Chicago Lawyers’ Committee for Civil Rights Under Law, Council on American-Islamic Relations: Chicago Chapter, Illinois Coalition for Immigrant and Refugee Rights, Mexican American Legal Defense and Education Fund, National Association for the Advancement of Colored People: Illinois Conference, and Rainbow/PUSH Coalition. *Id.*

invidious device that is a condition of inequality imposed on minority citizens on our roadways.”²³⁴ It then asked the governor to order the Illinois State Police to stop performing vehicle consent searches.²³⁵

Of course, some may raise an objection to this idea. As seen in Part III’s discussion of statistics on traffic stops made in Illinois in 2007, approximately ninety-one percent of all drivers consented to requests for vehicle searches.²³⁶ Interestingly, this percentage was fairly uniform throughout all five ethnic groups studied. If the vast majority of drivers agree to vehicle searches, is there really a problem? To answer that question, we must consider whether or not any of these people are actually “consenting” in the way we normally use that term.

First, let’s look at some history. The traditional standard for waiving a constitutional right in a courtroom is that the waiver must be voluntary, intelligent, and knowing.²³⁷ This test is two-pronged.²³⁸ The “voluntary” prong is concerned primarily with an objective analysis of the behavior of the government agents involved; some objectively bad state action is the threshold requirement for finding “involuntariness.”²³⁹ On the other hand, the “knowing and intelligent” prong is concerned with whether a person subjectively understands the right that he is giving up. Watching a judge take a guilty plea provides a good example of how to guarantee that a defendant is “intelligently and knowingly” giving up the trial rights he possesses: the judge first explains the rights, then inquires if the defendant understands, and finally asks if the defendant is willing to give up these rights. Similarly, this standard is also used when a suspect waives *Miranda* rights and agrees to be interrogated by the police.

Seven years after *Miranda*, the United States Supreme Court was asked to take the “voluntary, intelligent, and knowing” standard “to the streets.” The Court was asked to hold that a person could consent to a police request for a search only if the consent was “voluntary, intelligent, and knowing” (i.e., that the police officer actually told the person that he had the right to say “no”).²⁴⁰ The Burger Court refused to extend citizens this protection.²⁴¹ Instead, it held in *Schneckloth v. Bustamonte* that the validity of consent should be measured by the same

234. See Letter to Rod R. Blagojevich, *supra* note 233.

235. *Id.*

236. See text accompanying note 211.

237. *Johnson v. Zerbst*, 304 U.S. 458, 462–69 (1938) (waiver of right to counsel).

238. *Id.*

239. *Colorado v. Connelly*, 479 U.S. 157, 165 (1986).

240. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973).

241. *Id.* at 248.

standard used to evaluate the admissibility of confessions under the Due Process Clause: simple voluntariness.²⁴² Thus, police did not have to make sure the person knew he had a right to refuse.²⁴³ Accordingly, the touchstone of the voluntariness test is merely the absence of police coercion. The result is that in the thirty-five years since the *Bustamonte* decision, the United States Supreme Court has *never* found consent to a search to be involuntary.²⁴⁴

Professor Ric Simmons has tried to explain this.²⁴⁵ He notes that the very idea of a person who is carrying contraband somehow agreeing to a police search is ludicrous.²⁴⁶ To characterize the searched person's response as "voluntary" is, according to Simmons, "absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence."²⁴⁷ The "voluntariness" test traditionally included both objective and subjective considerations.²⁴⁸ Yet despite giving lip-service to subjective characteristics of the defendant, Simmons argues that the United States Supreme Court has actually come to view the "voluntariness" of consent through a purely objective lens.²⁴⁹ The Court focuses almost solely on the police behavior.²⁵⁰

Thus, what the court calls a "voluntariness" test has morphed into a purely objective "reasonableness" test. In other words, we all realize that no one "voluntarily" consents to a police search; the issue is rather

242. *Id.*

243. *Id.* at 249.

244. *See, e.g.,* *United States v. Drayton*, 536 U.S. 194 (2002) (holding that bus passengers' consent to a search of luggage and person absent suspicion was voluntary under the totality of the circumstances where officer asked if they objected).

245. *See* Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*, 80 *IND. L.J.* 773, 775-76 (2005) (proposing a new three-characteristic paradigm for the Court to adopt in regards to consent searches).

246. *Id.* at 774.

247. *Id.*

248. *Id.* at 777. *See* *Schneckloth*, 412 U.S. at 248 (holding that subjective factors such as a defendant's level of education, intelligence, or the presence of warnings were relevant to the totality of the circumstances test to determine whether a confession is voluntary). The *Schneckloth* Court even listed Supreme Court confession cases in which subjective factors were considered, including *Payne v. Arkansas*, 356 U.S. 560, 562, 567 (1958) (noting the low education level of accused); *Fikes v. Alabama*, 352 U.S. 191, 196 (1957) (describing the accused as having "low mentality, if not mentally ill"); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (considering the young age of the accused). *Schneckloth*, 412 U.S. at 248 n.37.

249. *See* Simmons, *supra* note 245, at 775 (noting that although the subjective element of the test still remains law on paper, *Drayton* marked the Supreme Court's departure from considering subjective factors in favor of focusing solely on the objective behavior of law enforcement to determine if a confession is compelled).

250. *Id.*

whether the police acted reasonably. The “voluntary” quality of the consent is chimerical.

There is also another problem. Although we speak of people “consenting” to a “request,” it is oxymoronic to speak of “consenting” to a “command.” Lawrence Solan and Peter Tiersma—two law professors who are also linguists—have recently raised the issue of whether police conducting traffic stops are actually making “requests” for consent, or whether something else is occurring.²⁵¹ Solan and Tiersma took a close look at the facts of the *Schneckloth* case.²⁵² One might assume that the police officer simply asked, “May I search your car?” Instead, what the officer actually said was, “Does the trunk open?” When he was told, “Yes,” the officer took the keys, opened the trunk, and found incriminating evidence.²⁵³ The Supreme Court held this to be a proper “consent” to a “request” to search.²⁵⁴

Solan and Tiersma note that “Does the trunk open?” is not literally a request for permission to search.²⁵⁵ We might consider it a request because we interpret language contextually.²⁵⁶ Indeed, we hear language not only in its literal meaning, but also in light of its “surrounding circumstances and shared background information and assumptions.”²⁵⁷

So why didn’t the officer simply say, “May I search your trunk?” Because all of us—including the police—often speak indirectly. As Solan and Tiersma note, “The reason we tend to issue requests, commands, and orders indirectly is that it is usually considered bad form to make a blunt order, even if we have the authority to do so.”²⁵⁸ However, consider again the “request” in *Schneckloth*: “Does the trunk open?” Would any sane person involved in a traffic stop at 2:40 a.m. really believe this was a mere “request” from the police officer that he could freely and voluntarily refuse?

Now consider the fact that ninety-one percent of Illinois drivers ostensibly “consented” to searches in 2007.²⁵⁹ In light of *Schneckloth*’s holding that police need not tell drivers they have the right to refuse, it

251. LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 38 (2005).

252. *Id.* at 36–46.

253. *Id.* at 36.

254. *Id.*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

255. SOLAN & TIERSMA, *supra* note 251, at 38.

256. *Id.* at 24.

257. *Id.*

258. *Id.* at 39.

259. NORTHWESTERN UNIVERSITY CENTER FOR PUBLIC SAFETY, *supra* note 208, at 10.

seems less remarkable that ninety-one percent of Illinois drivers in 2007 “consented” to police “requests” to search.²⁶⁰ Moreover, in light of the disproportionate number of minority drivers asked to consent to searches in Illinois, the consent search doctrine has understandably been labeled “the handmaiden of racial profiling.”²⁶¹

This is why some states have in various ways curbed consent searches.²⁶² As mentioned above, seven groups in Illinois—including the ACLU of Illinois, the Rainbow/PUSH Coalition, and the Mexican American Legal Defense and Education Fund—recently asked the governor to order the Illinois State Police to stop making consent searches of vehicles.²⁶³ This sentiment has even spread to the mainstream media. Calling consent searches a “fool’s errand,” Steve Chapman in the *Chicago Tribune* recently called for its abolition.²⁶⁴ Examining the statistics in the 2007 Illinois study, Chapman noted that “[f]ully 94% of the time, [the Illinois State Police] discover nothing illegal—meaning they inconvenience and humiliate 16 innocent people for every guilty one they turn up.”²⁶⁵

Thus, there are three possible ways to restrict consent searches. First would be a statute in the Illinois Code of Criminal Procedure abolishing the use of consent searches of vehicles and the use of their fruits at trial. Alternatively, the governor could accede to the request to at least stop the Illinois State Police from executing consent searches. And finally, at the very least, the codification of the *Gonzalez* rule would prevent

260. *Schneekloth*, 412 U.S. at 248–49.

261. Thomas, *supra* note 232, at 542.

262. For instance, the New Jersey Supreme Court continues to follow the holding in *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002). See *State v. Birkenmeier*, 888 A.2d 1283, 1291 (N.J. 2006) (consent searches following the stop of a motor vehicle are improper unless the authorities have reasonable articulable suspicion that the accused is engaged in criminal activity); *State v. Elders*, 927 A.2d 1250, 1260 (N.J. 2007) (the reasonable articulable standard enunciated in *Carty* applies equally to occupants of vehicles that are disabled on the highway). Minnesota has adopted a similar test. *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (holding that Article I, Section 10 of the Minnesota Constitution does not permit the search of a passenger of a vehicle during a routine traffic stop if the officer does not have an articulable basis to seek the consent to search). Rhode Island passed a comprehensive statute in 2004 that included: “No operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle which is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity.” R.I. GEN. LAWS § 31-21.2-5(b) (2004). In a 2003 settlement with the ACLU over a class-action lawsuit alleging racial profiling by the authorities, the California Highway Patrol agreed to ban consent searches and adopt sweeping reforms. Rodney Foo, *CHP Settles Racial Profiling Suit: S.J. Man’s Civil Rights Claim Changes Traffic-Stop Policy*, SAN JOSE MERCURY NEWS, Feb. 28, 2003, at A1.

263. Letter to Governor Rod R. Blagojevich, *supra* note 233.

264. Steve Chapman, *Consenting to Be Abused*, CHIC. TRIB., July 31, 2008, § 1, at 19.

265. *Id.*

police from engaging in consent searches without first having reasonable suspicion that the car indeed contained contraband.

There is a good reason why George Thomas claims that “[c]onsent is an acid that has eaten away the Fourth Amendment.”²⁶⁶ Since the Illinois Supreme Court refuses to act, it is time for either the governor or the legislature to fill the void.

V. CONCLUSION

Since 2002, Illinois has actually gone backwards in restricting pretextual stops of minority motorists. The Illinois Supreme Court has explicitly overruled four cases decided in 2002 and 2003 that had wisely restricted police power to turn routine traffic stops into fishing expeditions for contraband. Both the executive and legislative branches in Illinois must respond to this vacuum created by the Illinois Supreme Court. They must recognize the pernicious impact of pretextual traffic stops on minorities; they must limit the power of police during these stops; and they must abolish consent searches of vehicles.

266. Thomas, *supra* note 232, at 541.